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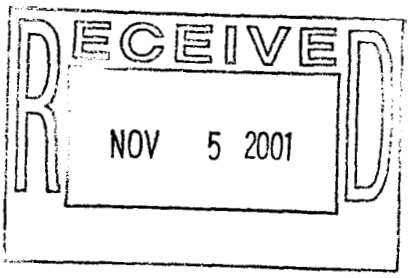

November 2,2001

Ms. Ann Terbush
National Marine Fisheries Service
Office of Protected Resources,
Permits Division
1315 East-West Highway
Room 13705
Silver Spring, Maryland 20910

Re: Comments of Sea World, Inc. et al.

Dear Ms Terbush:

On behalf of Sea World, Inc., Seal World of Texas, Inc., and Sea World of Florida, Inc., and Busch Entertainment Corporation, for themselves and on behalf of all of their respective theme parks maintaining marine mammals, enclosed please find for filing Comments in response to the Notice of Proposed Rule and Request for Comments issued by the National Marine Fisheries Service to implement 1994 amendments to the Marine Mammal Protection Act. Also enclosed is an extra copy of the Comments to be date stamped (and return in the enclosed, self-stamped and addressed envelope).

Please feel free to call me if you have any questions,

Thank you for your attention.

Sincerely,

Brad Andrews
Vice President, Zoological Operations
Sea World, Inc.

Enclosure

COMMENTS OF SEA WORLD, INC. *ETAL.*,

IN RESPONSE TO THE NOTICE OF PROPOSED RULE AND REQUEST FOR COMMENTS ISSUED BY THE NATIONAL MARINE FISHERIES SERVICE TO IMPLEMENT 1994 AMENDMENTS TO THE MARINE MAMMAL PROTECTION ACT

Sea World, Inc., Sea World of Texas, Inc., and Sea World of Florida, Inc. and Busch Entertainment Corporation for themselves and on behalf of all of their respective theme parks maintaining marine mammals,[1] hereby comment on the proposed rule published by the National Marine Fisheries Service of the United States Department of Commerce **("NMFS"),** regarding implementation of the 1994 amendments to the Marine Mammal Protection Act. 66 Fed. Reg. 35209 (July 3,2001).

I. INTRODUCTION AND REQUEST FOR SUMMARY WITHDRAWAL OF THE PROPOSED RULEMAKING

In the Spring of 1994, Congress enacted, and the President signed into law, amendments to the Marine Mammal Protection Act ("MMPA"), Pub. L. 103-238, 16 U.S.C. § 1361 et ***seq.*** (the "1994 Amendments"). One primary purpose of the 1994 Amendments was to clarify the respective jurisdictions of the National Marine Fisheries Service **("NMFS")** within the Department of Commerce, and the Animal Plant and Health Inspection Service ("APHIS") within the Department of Agriculture, regarding the regulation of marine mammals.

The 1994 Amendments unequivocally established that **NMFS** would have no role in the care, maintenance and general oversight of marine mammals once they left the wild and entered

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[1] These entities operate the following parks maintaining marine mammals: Sea World of California, Sea World of Florida, Sea World of Texas, Discovery Cove, and Busch Gardens – Tampa Bay. For convenience purposes, herein we refer to Sea World, Inc. Sea World of Texas, Inc., Sea World of Florida, and Busch Entertainment Corporation collectively as "Sea World."

into the United States. Issues regarding the humane handling, care, treatment, and transportation of marine mammals were left under the exclusive domain of APHIS pursuant to its jurisdiction and responsibilities under the Animal Welfare Act ("AWA"), 7 U.S.C. § 2131, *et seq.*

Among the many reasons which led Congress to act was the issuance in late 1993 by **NMFS** of complicated and burdensome proposed regulations that impermissibly would have expanded the regulatory reach of **NMFS** over marine mammals. By passing the **1994** Amendments, Congress decidedly rejected **NMFS'** attempt to assert control over marine mammal matters for which that agency so evidently lacked both statutory authority and practical expertise.

Notwithstanding Congressional rejection of NMFS' over-reaching plans seven years ago, in the current proposed rulemaking **NMFS** once again seeks to intrude upon APHIS' legitimate role and instead inject itself into unauthorized regulatory oversight of marine mammals not found in the wild.

In this regard, several of the more obviously unauthorized components of this rulemaking include NMFS' proposals:

- to empower itself to *examine marine mammals, inspect facilities* and compel the copying of *virtually any record or document* pertaining to marine mammals;

- to require, as part of the application process for a permit to import marine mammals for purposes of public display, that applicants -- and thereafter permitees -- *independently* demonstrate compliance with APHIS standards *even if they hold an AWA license;*

- to require foreign governments of facilities receiving marine mammals exported from the United States essentially *to act as an agent of NMFS and enforce United States law* under the MMPA and the AWA in the foreign country (the '"comity requirement").

Each of these proposed regulations, in one form or another, was found in the 1993 NMFS proposed regulations that Congress cast aside when it passed the 1994 Amendments.[2] Each is well beyond the scope of NMFS' authority under the MMPA, including the 1994 Amendments, and, indeed, each undermines APHIS' lawful responsibilities for the care and maintenance of marine mammals under the AWA.

NMFS might well have averted issuance of such obviously *ultra vires* proposals like the above, had it fulfilled its minimum statutory obligation in the promulgation of regulations under the MMPA. Section 112 of the MMPA, 16 USC § 1382, requires that NMFS consult with "any other Federal agency to the extent that such agency may be affected" before being able to "prescribe such regulations that are necessary and appropriate to carry out the purposes" of the MMPA. It is apparent that NMFS failed at these required tasks.

First, NMFS did not consult with APHIS (which is obviously "affected" by the proposed rulemaking) before making its specific proposals. *Second,* NMFS does not discuss or otherwise show how its proposals are "necessary and appropriate" under the MMPA. Indeed, NMFS cannot meet this latter burden since the proposals are inherent to *APHIS' functions* under the

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[2] The 1993 proposed regulations were published by NMFS at 58 Fed. Reg. 53320 (October 14, 1993). See *id.* for Proposed Section 216.38(b)(16) (NMFS inspections); Proposed Sections 216.36(a) (requirement to comply with permit restrictions) and 216.37(d) (requirement to comply with all captive maintenance regulations); and Proposed Section 216.34(b) (comity requirements).

AWA – a matter that would have been clear had NMFS afforded its sister agency advance notice and opportunity to comment. By depriving APHIS of this advance right to comment, NMFS simultaneously deprived the public of its rights to understand APHIS' views and comment on them. This procedural deficiency alone, which is a clear and inexcusable violation of Section 112 of the MMPA, 16 USC § 1382, renders NMFS' proposal invalid.

Sea World, accordingly, vigorously objects to the above and the other proposed rules discussed herein, all of which are beyond NMFS' authority under the MMPA to issue. Sea World respectfully requests that, until the consultation requirement of Section 112 of the MMPA is met, the entire proposed rulemaking be withdrawn summarily. Only after NMFS engages in consultation with APHIS and makes the product of that process public may NMFS issue new proposed regulations for renewed public review and comment.

II. BACKGROUND

In October 1993, NMFS published a lengthy proposed rulemaking (consisting of more than 40 pages in the Federal Register) seeking broad powers in the regulation of captive marine mammals. 58 Fed. Reg. 53320 (October 14, 1993). Shortly thereafter, in April 1994, Congress passed meticulously drafted amendments to the **MMPA** which were designed to eliminate **NMFS'** jurisdiction over the care and maintenance of marine mammals after they are taken from the wild. By virtue of those amendments, Congress clarified that APHIS -- and ***only*** APHIS, to the specific ***exclusion*** of **NMFS** – was authorized to govern marine mammals held in captivity.

One legislator after another in the House and Senate proclaimed this intent decisively and definitively.

For example, Representative Thomas J. Manton stated:

> [I]t is our intent by this legislation to reaffirm that the standards for the humane handling, care, treatment, and transportation of marine mammals are established under the Animal Welfare Act [AWA] and are developed and administered exclusively by the Animal Plant Health Inspection Service [APHIS] within the Department of Agriculture. These amendments to the MMPA, therefore, clearly establish that the National Fisheries Service has no role or authority to regulate the captive maintenance of marine mammals.

141 CONG. REC. H 1852 (1994) (emphasis added).

Similarly, Representative Randy "Duke" Cunningham said:

> Over the past **5** years, there has been much confusion in the zoological community due to overlapping jurisdictions.. **..**
>
> In addressing this problem we in Committee were able to reaffirm that the standards for the humane handling, care, treatment, and transportation of marine mammals are established under the Animal Welfare Act (AWA) and are developed and administered exclusively by the Animal Plant Health Inspection Service (APHIS) within the Department of Agriculture.
>
> This was done to clarify that the National Marine Fisheries Service cannot set its own standards, by regulation or by attaching to the permits general or specific conditions relating to captive maintenance, since the National Marine Fisheries Service has no authority to do so under the Animal Welfare Act, and still does not have authority to do so under the reauthorization of the MMPA.

Id., H1604 (1994) (emphasis added).

Likewise Senator Exon explained:

> In recent months, the U.S. Department of Agriculture and the **U.S.** Department of Commerce have been engaged in a jurisdictional tussle, which, if unresolved threatens to significantly complicate zoo and aquarium operations. Unless the Congress acts, there will be confusion,

> duplication, and added expense for virtually all American zoos and aquariums.
>
> This amendment, worked out between the public display community, the House Environment and Natural Resources Subcommittee and the Clinton administration takes a common sense approach and attempts to untangle a complicated knot of regulation and oversight.
>
> The amendment will clarify the lines of responsibility between the **U.S.** Department of Commerce and the **U.S.** Department of Agriculture, streamline the paperwork required when animals are transferred between exhibitors, improve the animal inventory system, maintain high standards for animal care and facilities and give Federal authorities the ability to act quickly to protect marine mammals when facilities and care fall below acceptable levels.

Id., S3302 (1994) (emphasis added).

Finally, Representative Gilman remarked that the **MMPA** amendments "are necessary to avoid excessive regulatory zeal on the part of the Federal Government, which has attempted to ignore the clear intent of Congress in the Act." Id., H1604 (1994) (emphasis added).

In the 1994 Amendments, Congress achieved its desired intent by *strictly limiting* NMFS' functions in connection with the public display of marine mammals.

Thus, **NMFS** (*i.e.*, the "Secretary" in the statute) **was** given the circumscribed right to issue **an** import permit for purposes of public display upon making three narrowly delineated determinations, *namely,* that the applicant

> (i) offers a program for education or conservation purposes that is based on professionally recognized standards of the public display community;
>
> (ii) is registered or holds a license issued under section 2131 et seq. of Title **7;** and

> (iii) maintains facilities for the public display of marine mammals that are open to the public on a regularly scheduled basis and that access to such facilities is not limited or restricted other than by charging of an admission fee.

16 USC § 1374(c)(2)(A)(i)-(iii). NMFS also was assigned the narrow tasks of receiving notifications in connections with the transfer or transport of marine mammals and gathering very specific information in that regard. *Id.* at §§ 1374(c)(2)(E), (c)(8)(B) and (c)(10). NMFS simply was given *no right or authority* to issue regulations dealing with care and maintenance issues.

Notwithstanding the clarity of the 1994 Amendments, NMFS has now issued this proposed rulemaking in a renewed attempt to obtain the very same powers associated with APHIS' duties of care and maintenance as to which it was deprived by Congress almost a decade ago. But even more puzzling, NMFS is acting despite *its own admissions* in this proposed rulemaking that the 1994 Amendments "removed the authority of NMFS to specify methods of care and transportation of marine mammals held for public display purposes", and that "[c]aptive care and maintenance of marine mammals held for public display are now under the **sole jurisdiction** of the Department of Agriculture's Animal and Plant Health Inspection Service (APHIS), which administers the Animal Welfare Act (AWA)." 66 Fed. Reg. at 35211 (emphasis added).

As discussed below, the proposed rulemaking simply cannot withstand scrutiny, must be withdrawn and must be rewritten and offered again for public comment before it may be promulgated in final form.

III. DISCUSSION

A. The MMPA Does Not Authorize NMFS to Examine Animals, Inspect Facilities, Or Obtain Unlimited Animal Records Or Other So-called "Relevant Information".

NMFS proposes to empower itself with a "right of inspection" purportedly to "facilitate compliance with the requirements of § 216.43." Proposed Section 216.43(a)(4), 66 Fed. Reg. at 35216. Specifically, NMFS seeks the rights to

- "[e]xamine any marine mammal held for public display;"
- "[i]nspect all facilities and operations which support any marine mammals held for public display;"
- "[rleview and copy all records concerning any marine mammal held for public display;" and
- compel permit holders to "provide any other relevant information requested."

Proposed Section 216.43(a)(4)(i)(A)-(C), at *id.* NMFS also believes that it is entitled to grant these powers not only to its own employees, but also to "any person" that it so designates. Proposed Section 216.43(a)(4)(i) at *id.*

Each component of this proposed regulation is beyond the scope of NMFS' authority under the **MMPA** and cannot be issued in final form.

Examination of Animals and Inspection of Facilities

NMFS nowhere explains in the proposed rulemaking how a right **to** "examine animals" will facilitate compliance with any regulations that the agency legitimately can issue. To the contrary, the examination of animals and the inspection of facilities housing captive animals is part and parcel of the *care and maintenance* authority which -- as the legislative history attests[3]

[3] *See* pp. 5-6, above.

and as NMFS itself concedes[4] -- the 1994 Amendments reserved strictly for APHIS under the AWA.

Thus, the AWA grants APHIS explicit authority to

> . . . make such investigations **or inspections** as [APHIS] deems necessary to determine whether . . . [anyone subject to the AWA] has violated or is violating. . . [the AWA], and for such purposes, **the Secretary shall have access to the places of business and the facilities, animals,** and those records required to be kept [of and by anyone subject to the AWA] . . . ."

7 U.S.C. § 2146 (emphasis added).

By contrast, Section 107(c) of the MMPA allows for searches by NMFS pursuant only to warrants issued by a judge or magistrate upon a showing of reasonable cause to enforce the MMPA. 16 U.S.C. § 1377(c). Nowhere within Section 107 does Congress grant NMFS the authority to conduct warrantless inspections on private property, as NMFS' proposed rule intends.

Obviously, Congress knows how to grant the authority for warrantless searches and Congress could have granted similar authority to NMFS that Congress did to APHIS in the AWA. Congress did not, because it eschewed overlapping agency jurisdiction regarding care and maintenance issues and left to APHIS the singular right to examine captive animals and inspect facilities housing those animals.[5]

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[4] **As** cited above, NMFS agrees that "[c]aptive care and maintenance of marine mammals held for public display are now under the sole jurisdiction of the Department of Agriculture's Animal and Plant Health Inspection Service (APHIS), which administers the Animal Welfare Act (AWA)". 66 Fed. Reg. at 35211.

[5] It is noteworthy also that NMFS' proposed regulation additionally violates the Fourth Amendment of the United States Constitution.

Records Review and Copying

Even more egregiously violative of the MMPA is NMFS' attempt in this rulemaking to gain essentially ***unfettered*** access to animal records and documents. In the 1993 proposed rulemaking, NMFS had sought the *qualified* right "to inspect or observe the permit holder's records . . . insofar as such records, **. . . pertain to [NMFS'] responsibilities under the Acts."** *See generally* the 1993 NMFS proposals at 58 Fed. Reg. 53320, Proposed Section

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The Supreme Court has held that "the Fourth Amendment's prohibition on unreasonable searches applies to administrative inspections of private commercial property." *Donovan v. Dewey*, 452 *U.S.* 594, 599 (1981). The Supreme Court has also held that a search is not unreasonable when **"Congress** has reasonably determined that warrantless searches are necessary and the federal regulatory presence is sufficiently defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Id.,* 452 U.S. at 600 (emphasis added). No such exception applies in this instance, however, since Congress made no findings in the MMPA that warrantless searches of property are necessary to fulfill the purposes of the MMPA.

Furthermore, a permit holder is not given notice under the **MMPA** that a warrantless inspection may occur. Warrantless inspections violate the Fourth Amendment if they are "so random, infrequent and unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials." *Id.* 452 U.S. at 600; *Marshall* ***v.*** *Barlow's Inc.,* 436 *U.S.* 307, 323 (1978). Thus, in *Marshall v. Barlow's Inc.,* the Supreme Court found that even though the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 657(a), authorized warrantless inspections, OSHA was not adequately tailored to place a business owner on notice that the search **"was** authorized by statute, and pursuant to an administrative plan containing specific neutral criteria." *Marshall,* 436 U.S. at 323. Therefore, the inspection plan contained in OSHA was not sufficiently certain to provide a "constitutionally adequate substitute for a warrant" and a warrantless inspection under **OSHA** would constitute a violation of the Fourth Amendment. ***New*** *York* ***v.*** *Berger,* 482 *U.S.* 691, 703 (1987) *quoting Donovan,* 452 *U.S.* at 600. **As** the Court stated in *New York* ***v.*** *Berger* ***"the regulatory statute*** must perform the two basic functions of a warrant: it must advise the owner of a commercial premises that the search is being made pursuant to law **and** has a properly defined scope, and it must limit the discretion of the inspecting officers." *Id.* (emphasis added) The MMPA, which never even mentions warrantless inspections of property, cannot be considered to adequately notify a permittee that the permittee's property will be subject to warrantless inspections. Accordingly, this proposed regulation should be withdrawn.

216.389(b)(16) (emphasis added).[6] This time, however, NMFS' proposal is that it be able to "[r]eview and copy all records concerning any marine mammal held for public display" and, rather broadly, "any other relevant information requested". Proposed Section 216.43(a)(4)(i)(C) and (a)(4)(ii) at 66 Fed. Reg. 35216 (emphasis added).

The MMPA permits the Secretary to "prescribe such regulations as are necessary and appropriate to carry out the purposes of [the MMPA]." 16 U.S.C. § 1382(a). NMFS articulates no reason why it needs, or should have, a right to review **"all"** marine mammal records. Indeed, there is no conceivable rationale that NMFS could possibly offer. NMFS' authority to issue regulations concerning the review or copy *any* records is limited *only* to such documents that NMFS needs to "carry out the purposes" of the MMPA, 16 USC § 1382(a), *i.e.,* those materials that an applicant or permit holder specifically must submit to NMFS under the statute. Thus, if NMFS needs to copy records, they ought to be limited to 1) the documents necessary to qualify for a permit under MMPA Section 104(c)(2)(A);[7] 2) the notifications required to be submitted under Section 104(c)(2)(E); and 3) documents containing the information required to be submitted under Sections104(c)(8)(B) and (c)(10).

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6 In full, the pertinent 1993 NMFS proposal read as follows:

> Upon request by the AA [Assistant Administrator], the permit holder must provide information regarding, and must allow **any** employee of the National Oceanic and Atmospheric Administration or any other person designated **by** the AA to inspect or observe the permit holder's records, facilities, protected species, protected species parts, and activities insofar **as** such records, facilities, or activities pertain to those activities authorized under, or species subject to, a special exception permit, or pertain to the AA's responsibilities under the Acts.

7 *I.e.,* copies of the AWA license and the education program and proof of the fact that the facility is opened on a regularly scheduled basis.

Of course, these documents and information would be filed with NMFS in the normal course of business; therefore, there would be no practical reason for NMFS to review or copy them, since they ostensibly would be in NMFS' possession. Accordingly, we urge that NMFS consider eliminating in the final rulemaking *any* regulation governing the review and copy records.

Proposal to Allow *Any* "Designated" Person to Inspect Facilities and Records

Section 107(a) of the MMPA permits NMFS to "utilize, by agreement, the personnel, services, and facilities of any other Federal agency for purposes of enforcing" the statute. 16 USC § 1377(a). Section 107(b) additionally allows **NMFS** to designate State "officers and employees'' for enforcement purposes. ***Id.*** § 1377(b). In sharp contrast to the **MMPA,** this proposed rulemaking allows NMFS to delegate "any" person to conduct inspections and examinations. ***See*** Proposed Section 216.43(a)(v)(4)(i) at 66 Fed. Reg. 36216. Clearly, designation by NMFS of "any" person is well beyond the scope of the agency's authority under the statute and cannot be sustained.

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In sum, the MMPA (1) absolutely does not support any right by **NMFS** to examine animals or to inspect facilities, and **(2)** theoretically would support a limited right by specific federal and state government officials to copy particular documents and records. Should, therefore, **NMFS** proceed with a proposed regulation regarding the copying of documents at all -- which we oppose **as** unnecessary and impractical -- the regulation must be rewritten to allow access (1) only to records required to be created under the **MMPA,** and (2) only by those

specific federal and state government employees who may enforce the law pursuant to Section 107 of the MMPA.

B. The MMPA Does Not Authorize NMFS to Require Independent Compliance with APHIS Standards.

As noted above, the 1994 Amendments set out three specific criteria necessary for a person to qualify for an import permit for purposes of public display. To repeat, they are that the applicant

> (i) offers a program for education or conservation purposes that is based on professionally recognized standards of the public display community;
>
> (ii) is registered or holds a license issued under section 2131 et seq. of Title 7; and
>
> (iii) maintains facilities for the public display of marine mammals that are open to the public on a regularly scheduled basis and that access to such facilities is not limited or restricted other than by charging of an admission fee.

16 USC § 1374(c)(2)(A)(i)-(iii). In disregard of the statute, **NMFS** now attempts to add a ***fourth*** criterion: ***namely,*** that the person "comply with all applicable Animal and Plant Health Inspection Service (APHIS) standards at 9 CFR subpart E'. Proposed Section 216.43(b)(3)(ii) at 66 Fed. Reg. 35216.

NMFS' proposal is no trivial matter. It is a back-door attempt to circumvent the **MMPA** and the 1994 Amendments and improperly expand the agency's jurisdiction. **As NMFS** itself explains:

> **NMFS** is proposing that the introductory phrase of the second criterion, 'maintains facilities for the public display of marine mammals . . .' means facilities that comply with all applicable APHIS standards **(9** CFR 3.104 through 3.1 18).

66 Fed. Reg. at 35212.

NMFS' "interpretation" of the second criterion is a perversion of the statute and Congressional intent to ***restrict*** -- not ***expand*** -- NMFS' purview. For example, Representative Cunningham said that

> . . . the **only** determination that **NMFS** can make, from the perspective of captive maintenance, is whether the individual or entity has an APHIS license or registration. **Possession of such a license *automatically* means that the licensee's standards for the humane handling, care, treatment, and transportation of the marine mammals to be taken and imported meet the requirements of the Animal Welfare Act.**

141 CONG. REC. H1604 (1994) (emphasis added.) NMFS' construction is only for the purpose of justifying its "proposal" to independently inspect an applicant's -- and, later, a licensee's -- facility to determine compliance with APHIS standards. That duty is delegated to APHIS only and cannot be co-opted by **NMFS.** Accordingly, **NMFS** must remove any and all references to its self-created fourth criterion when it publishes a final rule.

C. The MMPA Does Not Support NMFS' Attempt to Apply its Proposed "Comity Resuirement"

The MMPA allows the export of marine mammals by holders of import permits issued under the statute. See, *e.g.,* 16 USC § 1374(c)(2)(B)(ii). The only caveat is that "the receiving facility meets standards that are comparable to the requirements that a person must meet to receive a permit under this subsection for that purpose." *Id.* § 1374(c)(9). Seizing upon this "comparability" requirement, as well (apparently) upon a perceived right to seize marine mammals from persons no longer meeting the criteria for the issuance of a permit,[8] NMFS proposes to impose a requirement that it

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[8] It is for this purpose that **NMFS** apparently cites (at 66 Fed. Reg. 35213) to Section 104(c)(2)(D) of the **MMPA,** 16 USC § 1374(c)(2)(D).

> receive a statement from an appropriate agency of the government of the country where the foreign receiver/facility is located certifying that . . . (ii) The laws and regulations of the foreign government involved permit that government to enforce requirements equivalent to the requirements of the U.S. Marine Mammal Protection Act and U.S. Animal Welfare Act. **The foreign government will enforce such requirements and take protective measures where necessary for marine mammals exported from the United States. . .**

Proposed Section 216.43(e)(4)(ii) at 66 Fed. Reg. 35219. In essence, NMFS seeks to require that the foreign government act as NMFS' extraterritorial agent to enforce the MMPA (and the AWA). Unfortunately for NMFS, this proposed "comity" requirement exceeds the agency's statutory authority under the MMPA.

In *United States* v. ***Mitchell,*** 553 F.2d 996 (5th Cir. 1977), the Court held that the MMPA does not apply to activities conducted in foreign jurisdictions. Nothing in the 1994 Amendments changes -- or was intended to change -- that decision. The 1994 Amendments merely require that the foreign facility demonstrate that it maintains comparable AWA standards *before* it is permitted to obtain a marine mammal export. Once, however, that showing is made and the animal is in fact exported, the United States has no further jurisdiction or rights in the matter. For NMFS to require foreign governments to act as a surrogate and enforce United States law, is inconsistent with ***Mitchell*** and cannot withstand scrutiny.

Remarkably, NMFS again admits that it lacks a statutory base for its proposal. While NMFS states: ". . . NMFS has no jurisdiction over the animals once they are exported . . ." it continues with a qualifier that purports to explain its inappropriate proposed regulation:

> . . . at the same time [NMFS is] required to maintain an inventory of captive marine mammals and ensure comparability. NMFS concluded that the requirement of a comity statement is a reasonable means of ensuring that comparable public display requirements will be met. In that

> context NMFS intends that through comity agreements, using their own laws, the foreign governments will ensure that: 1) care and maintenance standards comparable to the APHIS standards that apply in the U.S. are met; **2)** marine mammals continue to be held for purposes consistent with section 104 of the **MMPA;** and 3) marine mammal inventory information for exported animals is provided to NMFS.

66 Fed. Reg. at 35213.

The fallacy in NMFS' reasoning, of course, is that the MMPA does not require the agency to maintain inventories of marine mammals *outside the United States.* Nor does the statute require "comparability" beyond an initial determination to the effect. The result of NMFS' proposal is the absurdity of foreign facilities and governments acting as stand-ins for NMFS (and/or APHIS) in enforcing United States law forever.[9] Nothing in the MMPA remotely supports such an outcome.

Indeed, NMFS itself recognized its statutory limitations regarding exports when, several years ago, it entered into an three-way agreement with APHIS and the Fish and Wildlife Service. *See* "Agreement among the National Marine Fisheries Service National Oceanic and Atmospheric Administration U.S. Department of Commerce and the Fish and Wildlife Service **U.S.** Department of the Interior and the Animal and Plant Health Inspection Service U.S. Department of Agriculture" (hereafter "Agreement").

One of the stated purposes of that Agreement is "[t]o ensure that a foreign facility receiving a marine mammal that is or has been subject to U.S. jurisdiction meets standards for the care and maintenance of captive marine mammals comparable to those promulgated under the AWA." Agreement, Article 111 paragraph 1. Under the terms of the Agreement -- and

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[9] Presumably, according to NMFS, any changes in, or amendments to, APHIS care and maintenance regulations would be the responsibility of foreign receivers to adopt – another incongruous result of NMFS' proposal.

consistent with the 1994 Amendments reserving care and maintenance issues for APHIS -- NMFS and APHIS agreed that *APHIS* would fulfill that responsibility. Thus, the Agreement notes as follows:

> Recognizing that under the AWA APHIS has promulgated specific regulations and standards for the humane care, handling, treatment, and transportation of captive marine mammals in the United States and its territories (9 CFR, Chapter 1, Subchapter A, Parts 1, 2, and 3), ***APHIS*** will evaluate comparability to AWA standards for foreign facilities. To complete such an evaluation, **APHIS** will require the receiving facility to provide documentation in accordance with the document entitled "Comparable Standards Evaluation for Foreign Facilities," available fi-om the APHIS, . . . and incorporated herein by reference.

Agreement, Article IV, paragraph 4g (emphasis added).

The Agreement then painstakingly continues with a complete listing of *all* the documentation that would have to be submitted to *APHIS* – not, as NMFS proposes to **NMFS** itself -- for *APHIS'* evaluation and approval that the receiving facility meets the compatibility requirements of the MMPA.[10] Significantly, **the Agreement does not require" a "comity**

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[10] These are:

(1) The name of any foreign facility requesting an official comparability evaluation in support of their request to import **U.S.** held marine mammals;

(2) Letter providing APHIS' official evaluation **of** the comparability of captive care and maintenance standards for all requesting facilities;

(3) A copy of the accuracy certification statement provided by the appropriate foreign government official;

(4) A copy of any material submitted with the document package that relates to access and/or educational program standards at the foreign facility; and

certification" to be delivered by the foreign government to NMFS as NMFS now seeks to impose via the proposed regulations.

The reason for this "omission" is incontrovertible – no such certification requisite exists under the MMPA, as NMFS and the other the parties themselves acknowledged by not including any such requirement in the Agreement. Such a requirement, in effect, would compel the foreign governmental entity to act as an agent of NMFS to enforce United States law extraterritorially and would conflict with the MMPA, in accordance with the Fifth Circuit's holding in *Mitchell."*

D. Other Proposals by NMFS Also Are Inconsistent with the Language and/or Intent of the MMPA and 1994 Amendments, or Are Vague and Ambiguous, and Should Not Be Finalized.

1. Seizure of marine mammals after APHIS issues a mere intent to suspend or revoke a license

NMFS proposes to make marine mammals subject to seizure even before APHIS makes a final determination that their holder/owner no longer meets the qualifications for an AWA license. Proposed Section 216.43(g)(iii) at 66 Fed. Reg. 35219. According to NMFS, it should have the right to seize the animals after the issuance by APHIS of a mere "intent to suspend or revoke" an AWA license. *Id.* This proposal must be withdrawn because it flies in the face of the clear language of the MMPA which allows seizures *only* when the AWA licensee "no longer

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(5) Upon request by the Services, and subject to all applicable FOIA restrictions concerning proprietary information, *APHIS* will provide copies of any inspection reports or outside evaluations of the foreign facility that were submitted in support of the comparability evaluation.

Agreement, Article IV, paragraph 4g (1)–(5).

[11] Neither does the APHIS "Comparable Standards Evaluation for Foreign Facilities" document referenced and incorporated in the Agreement.

meets the requirements of [holding an APHIS license] . . ." 16 USC § 1374(c)(2)(D)(i), *i.e.*, ***after*** the license *actually* has been revoked.

2. NMFS' Proposal Requiring Reporting of Stillbirths

The MMPA requires that marine mammals "births" be reported to NMFS. **16** USC § 1374(c)(8)(B)(i)(I). NMFS, however, seeks to require that "stillbirths" also be reported. Proposed Section 216.43(e)(4)(vii) at 66 Fed. Reg. 35218. The MMPA's "birth" and "deaths" reporting requirements are found in the same section and sub-paragraph -- *i.e.*, 1374(c)(8)(B) -- that deals with notification of sales, purchases and transports. Obviously, the purpose of all these reporting requirements is to keep periodic track of the existence and the whereabouts of marine mammals. Reporting "stillbirths" does not fit into nor fulfill this statutory scheme as a stillborn never lived and thereafter would not be sold, purchased or transported. Congress never required, nor intended to require, facilities to notify NMFS of stillbirths. Accordingly, the "stillbirths" proposal should be eliminated whenever final rules are promulgated.

3. NMFS' Proposals Regarding Notifications and Transports

NMFS' 1993 proposed regulations were unwieldy, costly and burdensome. Congress acknowledged this problem and took steps to rectify it by streamlining reporting and related requirements. For example, the 1994 Amendments simplified the means by which marine mammal holders/owners could transport and transfer animals without the need to obtain special permits or approvals (as NMFS had proposed). Accordingly, the MMPA requires only that NMFS be notified that such measures are being taken, but does not allow NMFS to require additional permits for those purposes. ***See,*** *e.g.*, 16 USC §§ 1374(c)(2)(B) and (E). Nevertheless,

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12 Sea World also notes that the "comity requirement" is unworkable for the practical and policy-related reasons cited by the Alliance of Marine Mammal Parks and Aquariums in its comments, which Sea World adopts by reference and incorporation herein.

NMFS seeks once again to saddle permitees with unnecessary paperwork that is beyond the exacting (and deliberately limited) statutory requirements.

Specifically, under the **NMFS** proposal, shipping and receiving facilities would be required to submit three Marine Mammal Transport Notification ("MMTN") reports as well as three Marine Mammal Data Sheet ("MMDS")s. *See generally* Proposed Sections 216.43(e)(1)and **(2)** at 66 Fed. Reg. 35217-18.[13] The MMPA requires only *one* notification. *See, e.g.,* 16 USC §§ 1374(c)(2)(E).[14] Additionally, according to NMFS, if a transport does not take place within 90 days, a new MMTN would have to be submitted. Proposed Section 216.43(e)(1)(v)(A) at 66 Fed Reg. 35218. Of course, the statute does not require the resubmission of a notification or limit its efficacy to only 90 days – the MMPA merely requires that the notification be made at least 15 days in advance of the action and contains no deadline for its validly." Finally, under the NMFS proposed regulations, both the holder and receiver of the marine mammal would be required to submit certifications to NMFS to the effect that the receiver qualifies to hold a marine mammal. *See generally* Proposed Section 216.43(e)(1)(i) at

13 Sea World also objects to the fact that **NMFS** has not published the proposed MMDS or MMTN forms for comment. The MMPA requires that any notice that **NMFS** may impose must be limited to the information that may be required in connection with the establishment of a marine mammal inventory. *Compare* 16 USC §§ 1374(c)(2)(E) and (c)(8)(B)(i)(II) ***with*** § 1374(c)(10). To comply with these dictates of the statute, **NMFS** must make the forms available for public comment, to ensure that **NMFS** is abiding by the statute. Until that occurs, the forms cannot be considered properly issued and NMFS cannot compel their usage.

Additionally, since **NMFS** has not published for comment the Marine Mammal Inventory Report-Summary ("MMIRS"), it too is null and void and without legal effect.

14 ***Sea*** World believes that if a transport is made, it should be confirmed at the end of a calendar year it connection with the submission of **an** annual inventory report.

15 If a transport is not made at all or is made beyond 90 days, Sea World proposes simply that records could (and should) be updated at ***year end*** – not after **an** arbitrary 90 day period -- in connection with the submission of the annual inventory.

66 Fed. Reg. 35217-18. Again, there is no such statutory requirement[16] and the proposal, therefore, is beyond the authority of the agency given the lengths that Congress went in the 1994 Amendments to reduce reporting requirements.[17]

4. Issues Regarding Takes in the Wild

a) "Significant direct or indirect adverse effect" on the species

In 1993, NMFS proposed that an applicant for a "public display" permit would have to demonstrate that "[t]he source of the proposed taking or importation of living marine mammals is one that will present the least practicable effects on wild populations." 1993 Proposed Section 216.35(b)(1). At the time, Sea World (at page 109 of its 1994 comments to NMFS) objected that "the phrase 'least practicable effects' is undefined. Before imposing a standard based on that vague phraseology, NMFS must articulate (in another proposed rulemaking) what 'least practicable effects' means."

Similarly, NMFS proposed in 1993 that an applicant establish, with respect to removals from the wild that "Where there is no quota in effect, [the removal] will not have, by itself or in

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16 If, for whatever reason, it is determined that a receiving facility does not meet the MMPA criteria for holding a marine mammal, then the shipping facility could be said to have submitted a false certification at its peril. There is no basis, however, for NMFS to impose an independent certification – especially on the shipping facility -- where Congress has not. A shipping facility generally has no independent way to know with certainty whether the receiving facility is qualified, and should not be required to certify to conditions existing at the facility of an independent third party.

17 Sea World also notes that NMFS would require a marine mammal owner to notify the agency of any transports between two of the owner's locations. See definition of "Transport" in Proposed Section 216.43(a)(v) at 66 Fed. Reg. 35215, as applied to the transfer and notification rules in Proposed Section 216.43(d) and (e) at 66 Fed. Reg. 35217. Such a transport is akin to an intra-facility movement that even NMFS would agree requires no special notice. Where the marine mammal will remain under the control and supervision of the same holder, even if the transport is between two facilities, notification to NMFS serves no legitimate purpose and, indeed, is inconsistent with Congressional intent in 1994 to reduce burdensome reporting requirements. Such a notice requirement should be eliminated in a final rulemaking.

combination with all other known takes and sources of mortality, a significant direct or indirect adverse effect on the protected species or stock . . ." 1993 Proposed Section 216.35(b)(2)(ii). Once again, Sea World commented (at page 109): "What is **a** 'direct or indirect adverse effect' on a protected species or stock? When Mr. Jeffers **[an** attorney representing NMFS] was questioned about this phrase, he could not think of an example of **an** 'indirect adverse effect.' 11/22 Tr. at 65-66. He invited the zoological community to comment on this point in order to give the agency an opportunity to answer the question in a final rulemaking. Id. For the record, we would expect further opportunity to comment on this phrase before **NMFS** may decide to retain it in any final rule."

In the current proposed rulemaking, NMFS once again uses vague and undefined terms when it seeks to impose a requirement that a take from the wild "will not have, by itself or in combination with all other known takes and sources of mortality, a **significant direct or indirect adverse effect''** on the species. Proposed Section 216.34(b)(3)(v)(B) at 66 Fed. Reg. 35216 (emphasis added). Without NMFS defining the ambiguous phrase "significant direct or indirect adverse effect" or establishing guidelines as to what it means, an applicant will not be capable of meeting this open-ended standard -- unless, of course, NMFS ***arbitrarily*** decides otherwise. Such potential abuse cannot be countenanced. **NMFS** must withdraw this proposed rule and re-issue it (if at all) for comment and reconsideration only after the agency sets criteria and explains how an applicant can demonstrate a "significant direct or indirect adverse effect" on the species.

b) NMFS' presence at a "take"

NMFS proposes that it be able to be present **as** an "observer" at a "take" from the wild, "if requested by the Office Director". Proposed Section 216.34(b)(5)(iii) at 66 Fed. Reg. 35216. Sea World submits that NMFS must clarify (and offer **an** opportunity for further comment upon)

the circumstances under which such a request could be made and the criteria for determining its appropriateness.

c) Takes of depleted species

Sea World objects to the NMFS proposal that would prohibit the take of a species that is "proposed by NMFS to be designated as depleted." Proposed Section 216.43(b)(4)(iii)(A) at 66 Fed. Reg. 35216. NMFS cannot require anything more than the **MMPA** itself which only prohibits the taking of a species that is *actually* found to be depleted. 16 USC § 1372(b)(3).

IV. CONCLUSION

For the foregoing reasons, the proposed rulemaking cannot go forward. NMFS must withdraw the proposed rulemaking in its entirety; submit it to APHIS for comment; publish APHIS' comments in the Federal Register and explain to the public which of the APHIS comments it accepts or rejects; and then re-issue the revised proposal for public comment. Alternatively, before NMFS may issue final rules it must eliminate, at the very least, those proposals as to which Sea World has objected.

Respectfully submitted,

Sea World, Inc.,

Sea World of Texas, Inc.,

Sea World of Florida, Inc.

Busch Entertainment Corporation

for themselves and on behalf of all their respective theme parks

maintaining marine mammals

Dated: November 2, 2001